No. 80-785

# In the Supreme Court of the United States

OCTOBER TERM, 1980

CERTAIN UNINDICTED INDIVIDUALS AND CORPORATIONS,
PETITIONERS

*v.*

UNITED STATES OF AMERICA AND
COMMONWEALTH OF VIRGINIA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**QUESTION PRESENTED**

Whether Rule 6(e) of the Federal Rules of Criminal Procedure, construed in harmony with Section 4F(b) of the Antitrust Improvements Act of 1976, 15 U.S.C. 15f(b), permits state attorneys general an opportunity to seek access to federal grand jury materials without demonstrating particularized need.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 629 F. 2d 943. The opinion of the district court (Pet. App. A14-A20) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on August 12, 1980. The petition for a writ of certiorari was filed on November 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

In September, 1978, a grand jury indicted seven corporations and the Tidewater Automobile Dealers Association for price fixing in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The defendants all pled nolo contendere and were sentenced. Thereafter, the Attorney General of Virginia, supported by the United States, moved for disclosure of grand jury materials, subject to a proper protective order, in furtherance of an antitrust investigation. The district court denied the motion (Pet. App. A14, A20).

In a unanimous opinion, the court of appeals reversed and remanded. Examining the purpose and legislative history of Section 4F(b) of the Antitrust Improvements Act of 1976, 15 U.S.C. 15f(b), the court discerned a transcendent goal of assisting state attorneys general in the public enforcement of the antitrust laws to the benefit of small consumers (Pet. App. A5). Fidelity to this policy, the court reasoned, compelled two conclusions: that grand jury materials fell within the ambit of Section 4F(b); and that Section 4F(b) permitted state attorneys general pursuing antitrust investigations to obtain access to grand jury materials without a showing of particularized need (*id.* at A6-A13). The court emphasized, however, that district courts possess power under Fed. R. Crim. P. 6(e) to deny disclosure if opponents

demonstrate a sufficient threat of harm to interests safeguarded by grand jury secrecy and that the district courts should impose appropriate protective orders on any disclosure to state attorneys general (*id.* at A13). The court of appeals remanded the case to the district court for reconsideration of the Virginia Attorney General's Rule 6(e) motion in light of the standards it had expounded.[1]

## ARGUMENT

The decision of the court of appeals is correct and raises no conflict with any decision of this Court or any court of appeals. Moreover, the court of appeals did not order the disclosure of grand jury materials; proceedings on remand will determine whether such disclosure will occur. Further review by this Court is therefore unwarranted.

1. Review of the decision of the court of appeals at this time would be premature. Although petitioners dispute the correctness of the court of appeals' decision, it is undisputed that the court did not direct the disclosure of any grand jury documents. Rather, it remanded the case to the district court for a hearing in which petitioners will have a meaningful opportunity to resist disclosure. After this hearing, the district court may deny the motion for disclosure. If it does, petitioners' complaint about a potential lifting of grand jury secrecy would be mooted. Thus, even if the issues which petitioners raise would otherwise merit review (but see pages 3-5, *infra*), review at this stage of the proceedings would be premature.

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[1]The court denied petitioners' motion for a stay of mandate pending application to this Court for a writ of certiorari. The Chief Justice denied an identical motion.

2. Petitioners erroneously suggest (Pet. 4-5, 10-13) that the decision of the court of appeals disavowed the standards expounded in *Douglas Oil Co.* v. *Petrol Stops Northwest,* 441 U.S. 211 (1979), and *United States* v. *Procter & Gamble Co.,* 356 U.S. 677 (1958), for disclosing grand jury materials under Fed. R. Crim. P. 6(e). As the court of appeals correctly noted (Pet. App. A10), both *Douglas Oil* and *Procter & Gamble* endorsed a "particularized need" standard for disclosure when Rule 6(e) materials are sought by private parties for use in private litigation. Here however, it is the attorney general of a state who has made the Rule 6(e) request, and he buttresses his request with the congressional policy favoring disclosure incorporated in Section 4F(b) of the Antitrust Improvements Act.

Section 4F(b) is an essential element of a broad congressional scheme endowing state attorneys general with special authority to enforce the antitrust laws. Companion provisions empower state attorneys general to bring antitrust actions, acting *parens patriae,* on behalf of consumers (15 U.S.C. 15c), relax evidentiary standards for proving damages in such cases (15 U.S.C. 15d), and sanction the allocation of aggregate damages to compensate injured consumers or the payment of such damages into the state treasury as a civil penalty (15 U.S.C. 15e).

Sections 4F(a) and (b) acknowledge the congressionally favored status of state attorneys general in initiating *parens patriae* suits by directing the United States Attorney General to offer them investigative assistance. The Attorney General of the United States is required, "[w]henever [he] has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action [under this *parens patriae* authority] based substantially on the same alleged violation of the antitrust laws," to "promptly give written notification thereof to such State attorney general" (15 U.S.C. 15f(a)).

Moreover, "[t]o assist a State attorney general in evaluating the notice [of the federal antitrust action] or in bringing any [*parens patriae*] action * * * the Attorney General of the United States shall, upon request of such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action * * *" (15 U.S.C. 15f(b)). The enforcement efforts of the state attorneys general would be severly impaired if grand jury materials could not be disclosed to them for these purposes.

The Court stated in *Douglas Oil* that disclosure of grand jury materials may be appropriate where the need for it outweighs the public interest in secrecy and that "the court's duty in a case of this kind is to weigh carefully the competing interests in light of the relevant circumstances and the standards announced by this Court" (441 U.S. at 223). Given the statutory commands just discussed and the congressional policy to encourage antitrust enforcement by state attorneys general, the court of appeals properly concluded that the balance in this case between the interest in grand jury secrecy and the public interest in disclosure of grand jury materials is far different from that involved in *Douglas Oil* and *Procter & Gamble,* which involved requests by private parties.

3. Moreover, contrary to petitioners' contention (Pet. 14-15), the ruling of the court of appeals is supported by the language and legislative history of Section 4F(b). That Section directs the United States Attorney General to disclose to his state counterparts investigative files or other pertinent antitrust materials "to the extent permitted by law * * *." As the court of appeals noted (Pet. App. A6-A9), the weight of legislative history compels the conclusion that Congress intended such antitrust files and materials to be

available to state attorneys general except where specifically prohibited by law.[2] Rule 6(e) does not *prohibit* all disclosure of grand jury materials; to the contrary, it permits limited disclosure under various circumstances (Pet. App. A9). Accordingly, the court of appeals correctly construed Rule 6(e) as permitting disclosure of grand jury materials to state attorneys general in proper cases to effectuate their congressionally conferred authority to initiate antitrust actions.

The court of appeals carefully balanced both the interests in grand jury secrecy identified in *Douglas Oil Co.* v. *Petrol Stops Northwest, supra,* and the congressional policy to promote public enforcement of the antitrust laws articulated in Section 4F(b) of the Antitrust Improvements Act. Thus it held that state attorneys general, with the support of the United States, need not demonstrate particularized need as a predicate to disclosure, but it also stressed that district courts should deny access under Rule 6(e) if an opponent demonstrates a sufficient likelihood and gravity of harm to the interests furthered by continued secrecy. Moreover, the court of appeals underscored the responsibility of district courts to limit disclosure under Rule 6(e) by employing appropriate protective orders (Pet. App. A13). This reconciliation of the concern for the secret operation of grand juries and for federal antitrust enforcement policy is eminently sensible. It is also harmonious with the view of the Ninth Circuit in *United States* v. *B. F. Goodrich Co.*, 619 F. 2d 798 (1980), the only other court of appeals to have addressed the issue.

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[2]Petitioners' reliance on the remarks of Senator Abourezk (Pet. 15) is misplaced. As the court of appeals explained (Pet. App. A6-A8), the remarks did not address the authority of federal district courts to release materials, the question raised in this case, and, in any event, were less authoritative than contrary statements of members of the House whence Section 4F(b) originated.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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